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August 12, 2011

Kamau Philbert, Esq.
Federal Election Commission
999 E Street, NW, 6th Floor
Washington DC 20463

Re: Response to Factual and Legal Analysis, MUR 6394

Dear Mr. Philbert:

This constitutes the joint response of Pingree for Congress, Anne Rand, as Treasurer, Rochelle M. Pingree, S. Donald Sussman, and Magic Carpet Enterprises LLC[1] (collectively, the "Respondents") to the Legal and Factual Analysis issued by the Office of General Counsel ("OGC") on July 8, 2011. For the reasons set forth below, the Commission should (1) not find probable cause that Respondents violated the Federal Election Campaign Act (the "Act") or Commission regulations and (2) withdraw the reason to believe findings against Magic Carpet Enterprises LLC and Mr. Sussman.

I. Background

On September 13, 2010, Congresswoman Pingree and Mr. Sussman, her fiancé at the time and now her husband, departed from the Congresswoman's district in Maine on a flight operated and paid for by Mr. Sussman.[2] The ultimate destination was Washington D.C. But, for personal reasons, the couple made a stop in New York, to attend a business meeting, spend time together, and visit with the Congresswoman's son and grandchild.[3] Before they boarded the jet to fly back to Washington D.C. in the evening, the couple also attended a fundraiser for Congresswoman Pingree's campaign in New York City. The now-married couple has made similar stops on several occasions in the past, and

[1] Magic Carpet Enterprises LLC is an LLC treated as a partnership for IRS purposes, and is owned by Mr. Sussman.

[2] While the jet is owned by Magic Carpet Enterprises LLC, Mr. Sussman paid for the flights in question from personal funds. It is Mr. Sussman's practice to pay, from his personal funds, the maintenance and operating costs of the jet, along with the fuel, crew, and other expenses associated with each use. As part of his dry lease agreement with Magic Carpet, Mr. Sussman also pays Magic Carpet Enterprises LLC a fee for each use.

[3] *See* Joint Respone to Complaint, attached as Exhibit A, at 1-2.

would have made this stop irrespective of Congresswoman Pingree's candidacy.

The Commission found reason to believe that, by stopping in New York on her way back to Washington D.C., Congresswoman Pingree violated 11 C.F.R. § 100.93(c)(2), and that Congresswoman Pingree, the Committee, and Anne Rand (in her official capacity as treasurer) violated 2 U.S.C. § 439a(c)(2) and 11 C.F.R. § 113.5(b). The Commission also found reason to believe that that Congresswoman Pingree, the Committee, and Anne Rand (in her official capacity as treasurer) violated 2 U.S.C. § 441a(f) by accepting an impermissible contribution. Finally, the Commission found "reason to believe" that Magic Carpet Enterprises LLC violated 2 U.S.C. § 441b(a), and that Mr. Sussman, its owner and principal officer, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(e) by making an impermissible contribution. Alternatively, the Commission found reason to believe that Donald Sussman violated 2 U.S.C. § 441a(a)(1)(A) by making an impermissible contribution.[4]

II. The Commission Should Not Find Probable Cause that Respondents Violated the Act or Commission Regulations

This stop in New York did not violate the Act. The Act, including the provisions added by the Honest Leadership and Open Government Act ("HLOGA"), regulates only those expenses and payments that qualify as "expenditures" or "contributions." It does not regulate expenses and payments for personal flights, including the flights at issue in this matter, which would exist irrespective of candidacy. The Commission confirmed this in a 2002 advisory opinion and reaffirmed it again in an advisory opinion issued earlier this year. In a 2009 enforcement action involving President Obama, the Commission relied explicitly on this advisory opinion to find that the President should have used personal funds, rather than campaign funds, to pay for a flight that would have been taken irrespective of candidacy. By now, this rule is ingrained in the Commission's precedents. It has never been superseded, or even questioned, either in the HLOGA rulemaking or anywhere else.

Proceeding against Respondents in the face of these precedents would raise grave due process concerns and contravene 2 U.S.C. § 437f(c)(2), which immunizes from liability those who rely upon "any provision or finding of an advisory opinion" and who act "in good faith in accordance with the provisions and findings of such advisory opinion ...."[5] Furthermore, proceeding against Respondents would serve no compelling governmental interest. The flights at issue in this matter were paid for by the Member's soon-to-be husband, and do not raise even the slightest threat of corruption or the appearance thereof. The House Committee on Ethics has already found that the trip did not violate Rule 23 of the House Ethics Rules, and there is no evidence that Congress intended the HLOGA ban to be broader than Rule 23.

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[4] The OGC suggests that the cost for each flight was $10,000. *See* Factual and Legal Analysis, Matter Under Review 6394 (July 6, 2011), at 7-8. This overstates the cost by a significant amount. The average hourly cost for using the jet (including fuel, crew, and an appropriate share of maintenance) is less than $4,000, and each flight was less than an hour.

[5] 2 U.S.C. § 437f(c)(2) (2011).

In the face of these constitutional and statutory infirmities, the Commission lacks any basis to proceed further in this matter. The Commission should not find probable cause that Respondents violated the Act or Commission regulations. It should dismiss the matter and close the file.

A. The OGC Failed to Make Threshold Finding Required by the Constitution and the Act

The Act regulates "expenditures" and "contributions." It does not regulate other types of expenses or payments. An expense is an "expenditure" and a payment is a "contribution" only where it is "for the purpose of influencing a Federal election."[6] A payment or expense that does not satisfy this legal standard is not subject to the Act.[7] Nor, as a constitutional matter, can it be. In decision after decision, the United States Supreme Court has been clear that the Commission may not regulate activity not encompassed by the statutory definitions of "expenditure" and "contribution."[8]

Consequently, to find reason to believe that HLOGA, 2 U.S.C. § 439a(c)(2), and the contribution limits, 2 U.S.C. §§ 441a(a)(1)(A), (f), were violated, there must be a threshold finding that the expense for the flights constituted an "expenditure" and that Mr. Sussman's payment of these expenses qualified as a "contribution."

1. The HLOGA ban applies only to "expenditures" and "contributions."

In its Legal and Factual Analysis, the OGC failed to make this mandatory threshold finding. At no point in its analysis did the OGC ask – let alone answer – whether the expense or payment was "for the purpose of influencing a Federal election." Instead, the OGC concluded that HLOGA supplanted the statutory definitions of "expenditure" and "contribution" with a so-called "bright line test for any travel in connection with the

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[6] *See* Advisory Opinion 2006-10 (Echo Star) ("The Act and Commission regulations define the terms 'contribution' and 'expenditure' to include any gift of money or 'anything of value' for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and 100.111(a).").

[7] *See, e.g.* Advisory Opinion 1981-16 (Carter-Mondale) ("Specifically, in Advisory Opinions 1981-13, 1980-4, and 1979-37, the Commission concluded that donations and disbursements made for the purpose of defending oneself in a lawsuit were not 'contributions' or 'expenditures.' Thus activity to pay the cost of legal defense in those situations was outside the purview of the Act."); Statement of Reasons of Commissioners David M. Mason, Bradley A. Smith, Karl J. Sandstrom, and Scott E. Thomas, Matter Under Review 4960 (Dec. 21, 2000), at 3 (finding that failure to show that purchase of House met the statutory definition of "contribution" was a "threshold deficiency" in complaint); Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 5842 (June 10, 2009), at 7 ("... if there is no evidence of expenditures made or contributions received, the inquiry ends there without any major probe of the group's major purpose.").

[8] *See, e.g. Buckley v. Valeo*, 424 U.S. 1 (1976); *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986); *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007). In fact, in these cases, the Supreme Court determined that the Act could be applied consistent with the Constitution only if the term "expenditure" was *further narrowed* to cover only words of express advocacy or their functional equivalents.

candidate's election."[9]

But HLOGA did no such thing. The HLOGA travel ban applies only to "expenditures" and in-kind "contributions" of non-commercial travel, and does not purport to restrict, in any way, expenses of, or payments for, non-commercial travel that do not qualify as "expenditures" or "contributions." The statute says, "in the case of a candidate for election for the office of Representative in ... the Congress, an authorized committee and a leadership PAC of the candidate *may not make any expenditure* for a flight on a [non-commercial] aircraft" unless the flight falls within one of two exceptions.[10] The Commission's implementing regulation mirrors the statute nearly word-for-word, providing that "a candidate for the office of Representative in ... the Congress, and any authorized committee or leadership PAC of such candidate, shall not make *any expenditures*, or receive *any in-kind contribution*, for travel on an aircraft" unless the travel falls within one of two exceptions.[11]

As one Commissioner has said, by "its express terms, HLOGA's requirements apply only to travel *expenditures* of federal candidates, their authorized committees, House leadership PACs, and other political committees making in-kind contributions to federal candidates in the form of travel payments."[12] The Commission's guidance confirms this as well. While the words "bright line" do not appear in the Commission's explanation for its rule, what does appear is a clear statement that the ban on non-commercial travel applies only to "expenditures" and in-kind "contributions."[13] In its Notice of Proposed Rulemaking, for example, the Commission stated that "[t]he new law expressly applies to expenditures by authorized committees and leadership PACs of House candidates, including expenditures made by the candidates themselves on behalf of their authorized committees ... *This prohibition does not apply when the travel would not be considered an expenditure by the candidate, the candidate's authorized committee, or candidate's leadership PAC.*"[14]

In other words, while HLOGA barred the making of "expenditures" and the receipt of in-kind "contributions" for non-commercial travel, it did not actually change the definitions of "expenditure" or "contribution." In the Explanation and Justification, the Commission included a footnote clarifying that, for HLOGA purposes, the term "expenditure" was

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[9] *See* Factual and Legal Analysis, Matter Under Review 6394, at 7-8.

[10] 2 U.S.C. § 439a(c)(2) (emphasis added).

[11] *See* 11 C.F.R. § 113.5(b) (2011) (emphasis added). Because the receipt of an in-kind "contribution" necessarily results in an "expenditure" by the receiving committee, HLOGA also bars a House candidate from receiving an in-kind "contribution" of a non-commercial flight. *See* Explanation and Justification for Final Rule, Campaign Travel, 74 F.R. 63951, 63963 (Dec. 7, 2009).

[12] *See* Commissioner Matthew Petersen, FEC Implemented Congress' Vision on Travel Rules, Roll Call (Dec. 1, 2009), *available at* http://www.rollcall.com/issues/55_62/-40988-1.html (last visited on August 12, 2010) (emphasis added).

[13] 74 F.R. at 63952 (Dec. 7, 2009) (emphasis added) ("HLOGA amended the Act to prohibit House candidates, their authorized committees, and their leadership PACs from making any *expenditure* for non-commercial travel on aircraft.").

[14] Notice of Proposed Rulemaking, Campaign Travel, 72 F.R. 59953, 59957 (Oct. 23, 2007) (emphasis added).

limited to the activity described in 11 C.F.R. § 100.111(a), *e.g.* "any payment made by any person for the purpose of influencing any election for Federal office."[15] The Commission has also confirmed that "[n]othing in HLOGA or its legislative history suggests that 'contributions' is intended to have a different meaning from that already established in FECA and Commission regulations."[16]

2. The OGC's proposed "bright line" test has no basis in the Act or regulations.

Disregarding these limitations, the OGC found that the conduct at issue violated HLOGA and that Mr. Sussman's payment for the flights resulted in an excessive contribution. The latter finding exposes the core problem with the OGC's analysis: its failure to determine that an "expenditure" or "contribution" had been made. It goes without saying that before finding a violation of the Act's contribution limits, the Commission must determine that a "contribution" occurred. Section 441a(a)(1)(A) of the Act provides that "no person shall *make contributions* ... to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000" while section 441a(f) provides that "[n]o candidate or political committee shall knowingly accept *any contribution* or make any expenditure in violation of the provisions of this section."[17] Yet incredibly, the OGC made a reason to believe finding that the Act's contribution limits had been violated *without even making a finding that there had been a contribution.*

The OGC suggests that the HLOGA rendered obsolete the longstanding rule that, before finding a violation of the Act, the Commission first had to determine that an "expenditure" or "contribution" had been made. In place of this longstanding rule, according to the OGC, Congress created a "bright line test," which allows the Commission to find violations without making a threshold finding that an "expenditure" or "contribution" had been made. The OGC does not cite any legal authority for this proposition, nor does it attempt to explain the passages in HLOGA, the regulations, and the Commission's guidance – summarized above – expressly limiting the travel ban to "expenditures" and "contributions."

Instead, the OGC surmises congressional intent from language in a regulatory exception to the definition of "contribution" found at 11 C.F.R. § 100.93. This position is bizarre for several reasons, not the least of which are that section 100.93 preceded HLOGA and that the regulatory language does not appear anywhere in the statute. The Commission promulgated section 100.93 in 2003 to describe the circumstances under which a payment for non-commercial travel, which otherwise satisfied the definition of "contribution," would nonetheless be exempt from the Act's contribution limits and

[15] 74 F.R. at 63952, n. 3.
[16] Explanation and Justification for Final Rule, Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants, 74 F.R. 7285, 7301 (Feb. 17, 2009).
[17] 2 U.S.C. § 441a(a)(1)(A), (f).

prohibitions.[18] Under the regulation, if a political committee made an "expenditure" for non-commercial travel, it could avoid the receipt of an excessive or impermissible in-kind "contribution" by paying the service provider for each "campaign traveler" (*e.g.* someone who was "traveling in connection with an election for Federal office on behalf of a candidate or political committee") who traveled on its behalf. HLOGA prohibited House candidates from utilizing section 100.93 to avoid the receipt of an in-kind "contribution" once it had already made an "expenditure" for non-commercial travel.[19] To reflect this prohibition, the Commission promulgated new section 100.93(c)(2).

The OGC claims that, in promulgating section 100.93(c)(2), the Commission intended to supplant the *statutory* definition of "expenditure" and "contribution." This is simply wrong. Section 100.93 is an *exception* to the definition of "contribution"; it is "not the first prong of a two-prong test" to determine whether a payment is a "contribution."[20] In determining whether a "contribution" has been made, the threshold question is whether the payment is "for the purpose of influencing a Federal election." If the answer is no, the inquiry ends. Only if the answer is yes does the Commission even inquire whether the payment qualifies for the exception at section 100.93.[21] The structure of the regulations reflects this. Subpart B of Part 100 of the regulations limits the term "contribution" to "the payments, services, or other things of value described in this subpart" and defines "contribution" to mean a "gift, subscription, loan ... advance, or deposit of money or anything of value made by any person *for the purpose of influencing*

[18] *See* Explanation and Justification for Final Rule, Travel on Behalf of Candidates and Political Committees, 68 F.R. 69583, 69583 (Dec. 15, 2003) (emphasis in original).

[19] 74 F.R. at 63956, n. 8 ("Although the general rule in 11 CFR 100.93(b)(2) states that no contribution results where a campaign traveler pays the services provider the required rate in accordance with 11 CFR 100.93(c), there is no rate applicable to House candidates in 11 CFR 100.93(c).").

[20] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, Matters Under Review 5694 and 5910 (April 27, 2009), at 16 (finding that "major purpose" test is not the first prong of a two-prong test to determine "political committee" status; rather, it provides an *exception* to the definition of "political committee" that may be utilized by an entity that meets the statutory definition of "political committee").

[21] In Matter Under Review 5937 (Romney for President), the Commission considered whether a volunteer's payment for a flight to transport other volunteers to a fundraising event violated the Act's contribution limits. Because the payment exceeded $1,000, it did not qualify for the exception to "contribution" found at 11 C.F.R. § 100.79(a)(1). But even though there was disagreement with respect to the ultimate disposition of the MUR, all six Commissioners agreed that the failure to qualify for the exception did not, by itself, render the payment a "contribution" under the Act. *See* Supplemental Statement of Reasons of Vice-Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, Matter Under Review 5937 (June 16, 2009), at 3 ("[W]e agree that the Act only reaches travel expenses incurred 'on behalf of' a campaign."); Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub (March 16, 2009), at 5 ("We do not dispute that any travel undertaken in the three examples cited by RFP would fall outside of the definition of contribution and thus would not be subject to the travel exception cap of $1,000."). Additionally, the Commission has consistently held that the cost of defraying litigation unrelated to compliance with the Act is not an "expenditure" or "contribution," even though such legal services do not qualify for the exception at 11 C.F.R. § 100.86. *See* Advisory Opinion 1981-13 (Moss) ("In Advisory Opinions 1980-4 and 1979-37 ... the Commission concluded that because donations and disbursements for the purpose of defending oneself in a lawsuit were not 'contributions' or 'expenditures,' nothing in the Act or Commission regulations would prohibit or limit the receipt of those donations.").

any election for Federal office ...."[22] If a payment does not qualify as a "contribution" under Subpart B, it is outside the scope of the Act and not subject to its limits or restrictions. Subpart C of Part 100 then describes certain payments that, though satisfying the definition of "contribution" under Subpart B, are nonetheless exempt from the Act's prohibitions and limits. But the exceptions in Subpart C do not expand, in any way, the definition of "contribution" found in Subpart B.

Finally, even if the OGC could show that section 100.93 is relevant to determining which payments qualify as "contributions," there is no evidence that the Commission intended the "in connection with" standard in section 100.93 to be any broader than the "for the purpose of" standard in 11 C.F.R. § 100.52(a). In similar contexts, the Commission has held that the two standards are coextensive with each other.[23] Here, that is the only interpretation which does not result in a direct conflict with the Act or the Constitution.

By finding reason to believe without determining that an "expenditure" or "contribution" had made, the OGC committed clear legal error.

B. The Flights Did Not Result in an "Expenditure" or "Contribution"

Once the Commission asks the correct question – whether the expense for and the payment of the flights qualified as "expenditures" or "contributions" – it does not have to look far to find the right answer. As the Commission has held on several occasions, an expense for flights that would exist irrespective of candidacy is not an "expenditure," and the payment for such an expense is not a "contribution." The Commission reached this conclusion in a 2002 advisory opinion; it relied upon this opinion in a 2009 enforcement action involving President Obama; and it reaffirmed the opinion earlier this year. Because the expense for the September 13 flights was a defined expense that would exist irrespective of candidacy, and because Mr. Sussman's payment for the flights would have been made irrespective of candidacy, there no "expenditure" or in-kind "contribution," and no violation of HLOGA or the contribution limits. Alternatively, the Commission could reach the same conclusion by relying upon 11 C.F.R. § 106.3(d), which exempts from the definition of "expenditure" flight expenses between a candidate's district and Washington D.C. paid for by a third party.

1. The payment for a flight made irrespective of candidacy is not an "expenditure" or "contribution."

The Act defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[24] The Act requires that candidates use "contributions" to pay for "expenditures."[25] On the other hand, the Act

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[22] 11 C.F.R. §§ 100.51(a), 100.52(a).
[23] *See* Advisory Opinions 2003-15 (Majette), 2010-3 (National Democratic Redistricting Trust), 2011-1 (Carnahan).
[24] 2 U.S.C. § 431(9)(A)(i).
[25] *Id.* § 439(a)(1).

makes it a federal crime to convert "contributions" to personal use.[26] To distinguish between "expenditures" (which *must* be paid with "contributions") and personal use expenses (which may *not* be paid with "contributions"), the Act draws a clear line: expenses that would "exist irrespective of the candidate's election or individual's duties as a holder of Federal office" are personal use not covered by the Act, while expenses that would *not* exist irrespective of candidacy are "expenditures."[27]

Applying this statutory framework, the Commission, in a 2002 advisory opinion, confirmed that a payment for a flight made irrespective of candidacy is not a "contribution" and is not subject to the Act's prohibitions or limits.[28] In that request, the City of Bettendorf, Iowa – a prohibited corporate source under the Act[29] – asked the Commission whether it could pay for its Mayor, who was also a candidate for the U.S. House of Representatives, to fly between Bettendorf, Iowa and Washington D.C. While in Washington D.C., Mayor Hutchinson planned to engage in official activities (25 percent of her time), Federal campaign activities (25 percent), and personal activities (50 percent).

At the time the request was made, the Commission had been interpreting its regulations, 11 C.F.R. § 106.3(b), to require the use of campaign funds to pay for air travel to a "stop" where any non-incidental campaign activity took place.[30] But this interpretation posed a direct conflict with the personal use prohibition, because in many instances it required the use of campaign funds to pay for an expense that would exist irrespective of candidacy. It also presented candidates like Mayor Hutchinson with an unenviable – and likely unconstitutional – Catch-22. If the City paid for the flights, Mayor Hutchinson could be subject to an enforcement action for accepting corporate contributions. Yet if Mayor Hutchinson used campaign funds to pay for flight expenses that, because of the official and personal components, would exist irrespective of candidacy, she could be subject to an enforcement action for converting campaign funds to personal use.

In a 4-2 vote, the Commission clarified that a payment for a flight made irrespective of candidacy did *not* qualify as a "contribution" under the Act and could be paid by

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[26] *Id.* §§ 439(b)(1), (2).

[27] Under Commission regulations, the payment by a third party of an expense that would otherwise be "personal use" is treated as a "contribution" unless the payment would have been made irrespective of candidacy. *See* 11 C.F.R. § 113.1(g)(6). Because Mr. Sussman would have made the payment irrespective of Congresswoman Pingree's candidacy, this provision is inapposite. *See* Advisory Opinion 2008-17 (Bond) ("The third-party payment provision asks whether the payment would have been made by the third party irrespective of the Federal candidate's candidacy for office. In other words, would the third party pay the expense if the candidate was not running for Federal office? If the answer is yes, then the payment does not constitute a contribution.").

[28] *See* Advisory Opinion 2002-5 (Hutchinson).

[29] *See id.* at n. 8 ("Therefore, if it were concluded that, pursuant to section 106.3(b)(3), the entire trip was campaign related, then Ms Hutchinson could not accept City funds even for those portions of her travel that related exclusively to her official activities on behalf of the City.").

[30] *See, e.g.* Advisory Opinions 1992-34 (Castle), 1994-37 (Schumer).

otherwise prohibited sources (such as a municipal corporation).[31] The decision, as the vote attests, was not unanimous. One Commissioner advocated for the position that the OGC argues for in this matter: that engaging in any campaign activities at a "stop" requires that the travel to the stop be treated as an "expenditure."[32] But four Commissioners rejected this position, establishing a clear rule that a payment for flights made irrespective of candidacy do not constitute "contributions" under the Act.

This opinion is not merely a shield for candidates; the Commission has used it as a sword as well. In MUR 6127, the OGC concluded that President Obama's flight to Hawaii in the closing days of the 2008 presidential campaign to visit his terminally ill grandmother was not an "expenditure" and should have been paid with personal funds.[33] The President engaged in a substantial amount of campaign activity while on the trip.[34] But relying explicitly on Advisory Opinion 2002-5, the OGC concluded that the "air travel itself appears to have been a defined expense that would have existed irrespective of the campaign activity" and, under Advisory Opinion 2002-5, it was not an "expenditure" and could not be paid with campaign funds.[35] The Commission, of course, cannot have it both ways. If the Commission can bar candidates from using campaign funds for flight expenses that would exist irrespective of candidacy, it cannot also treat such expenses as "expenditures" and subject them to the Act's restrictions and prohibitions. Where core First Amendment rights are at stake, "[t]his 'heads I win, tails you lose' approach cannot be correct."[36]

Earlier this year, the Commission once again reaffirmed Advisory Opinion 2002-5. In Advisory Opinion 2011-2, the Commission once again confirmed that flights that are "defined expenses that would have existed irrespective" of candidacy are *not* "expenditures," and the payment for those flights by otherwise prohibited sources are not impermissible "contributions." The request involved a proposed multi-city tour to promote Senator Scott Brown's book, with the book publisher paying for flights between the cities.[37] Senator Brown asked the Commission whether he could attend campaign fundraisers while in these cities. Both draft opinions issued by the OGC concluded that, under Advisory Opinion 2002-5, flights that constitute "defined expenses that would have

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[31] *See* Advisory Opinion 2002-5 ("Because the airfare represents a defined expense that would have existed irrespective of any personal or campaign related activities, the entire cost of the ticket may be paid for by City with no obligation by Ms. Hutchinson or her campaign committee to reimburse the City.").

[32] Memorandum from Commissioner Scott Thomas to Commission (May 3, 2002) ("[M]y alternative reads 11 CFR 106.3(a) and (b)(2) and (3) to require the full amount of airfare between the district and Washington to be campaign related. The regulation establishes a hard rule, perhaps, but it is designed to prevent use of outside resources to partially subsidize travel to what has to be characterized as a campaign stop. I can't read Part 113 as overriding this approach.").

[33] *See* First General Counsel's Report, Matter Under Review 6127 (June 18, 2009). The OGC concluded – and the Commission concurred – that the amount at issue was not significant enough to pursue the matter. *See* Factual and Legal Analysis (Nov. 25, 2009). Instead, it sent a cautionary letter.

[34] *See* Response from Barack Obama, Obama for America, and Martin Nesbitt, Treasurer, Matter Under Review 6127 (Dec. 22, 2008).

[35] First General Counsel's Report, Matter Under Review 6127, at 6.

[36] *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 471 (2007).

[37] *See* Advisory Opinion 2011-2 (Brown).

existed irrespective" of candidacy are not "expenditures" and can be paid by otherwise prohibited sources.[38]

The only disagreement between the drafts was a factual one: Draft A (supported by three Commissioners) concluded that the flights were defined expenses that would have existed irrespective of candidacy, while Draft B (supported by three Commissioners) concluded they were not. Here, there is no dispute that the payment for the flights was made irrespective of candidacy. On at least several occasions, Mr. Sussman has paid for personal trips between Maine and New York, where no campaign activity whatsoever took place. Several of these trips preceded Congresswoman Pingree's 2010 candidacy.[39] Additionally, whereas Senator Brown's non-campaign activities were intertwined with his candidacy (because the book focused substantially on his candidacy), Congresswoman Pingree's personal and business activities on September 13, 2010 were entirely unrelated to her candidacy.[40] This was a personal trip – plain and simple – and would have been taken irrespective of candidacy.

The OGC contends that Advisory Opinion 2002-5 and its progeny are inapposite here because they "dealt with allocation of permissible travel costs prior to the passage of HLOGA."[41] That cannot be right. Although Advisory Opinion 2002-5 preceded HLOGA, MUR 6127 and Advisory Opinion 2011-2 were decided after HLOGA became law. OGC then argues that, while Advisory Opinion 2002-5 "might be relevant to determining whether Mr. Sussman could pay for Representative Pingree's commercial airfare on a trip with him that would have occurred irrespective of her candidacy, [it is] irrelevant to determining whether Representative Pingree could use prohibited non-commercial flights in connection with her re-election campaign."[42] Again, not so. Advisory Opinion 2002-5 and its progeny stand for the proposition that a payment for a flight made irrespective of candidacy is not an "expenditure" and, as a result, is not subject to the Act's limits and prohibitions. For Mayor Hutchinson, this meant that an otherwise prohibited source could pay for her flight expenses. In this case, it means that Congresswoman Pingree's flight on a non-commercial aircraft did not violate HLOGA.[43]

2. The cost of a flight between Washington D.C. and a candidate's home district is not an "expenditure" or

[38] *See* Agenda Document No. 09-11, Drafts A and B, Advisory Opinion 2011-2 (Brown).
[39] *Compare* Draft B, Advisory Opinion 2011-2 ("The book tour is not an event that predates Senator Brown's Federal office or his campaign ....").
[40] *Compare id.* ("The publisher also represented that Senator Brown's election to the Senate is a substantial topic of the book.").
[41] Factual and Legal Analysis, Matter Under Review 6394, at 7-8.
[42] *Id.*, at 7-8.
[43] The OGC objects to the use of the "irrespective" test by claiming that it would allow a candidate to avoid HLOGA by "including some non-campaign activity on a trip involving campaign activity." OGC Response, at 8. That misstates the "irrespective" test. Where a flight would *not* have been taken irrespective of candidacy, the expense for that flight is an "expenditure" subject to HLOGA, regardless of whether the candidate engages in some personal activity at the destination. Conversely, where a flight would have been taken irrespective of candidacy, the expense for the flight is not an "expenditure" subject to HLOGA.

"contribution" when paid by a third party.

The payment for the flights is also exempt from the definition of "expenditure" because it was paid by a third party and was "for travel between" Washington D.C. and Congresswoman Pingree's home district. Section 106.3(d) of the regulations provides that "[c]osts incurred by a candidate for the United States Senate or House of Representatives for travel between Washington D.C. and the State or district in which he or she is a candidate need not be reported herein unless the costs are paid by a candidate's authorized committee(s), or by any other political committee(s)."[44] The Commission's Explanation and Justification confirms that "[e]xpenses incurred by a candidate for the House or Senate for travel to or from his state or district and Washington, D.C. *are not reportable as an expenditure* unless paid from a campaign account."[45]

The flights at issue were for travel between Congresswoman Pingree's home district and Washington D.C., with a stopover in New York. The regulation, on its face, is ambiguous as to whether it covers only non-stop, direct flights between the district and Washington D.C., or whether it covers all flights that are part of the travel itinerary between the district and Washington D.C.

But in a 1984 enforcement action involving intra-state travel by Congressman Don Young, the Commission clarified that the exception covers all flights that are part of the travel itinerary between the congressional district and Washington D.C.[46] That enforcement action involved Congressman Young's attendance at a campaign fundraiser in the midst of an official fact-finding tour in the State of Alaska. As part of the tour, the Federal government paid for the following flights:[47]

- Washington D.C. to Mindt Air Force Base (April 14, 1984)
- Mindt Air Force Base to Juneau (April 15, 1984)
- Juneau to Sitka (April 15, 1984)
- Sitka to Juneau (April 16, 1984)
- Juneau to Kodiak (April 17, 1984)
- Kodiak to Anchorage (April 18, 1984)
- Anchorage to North Slope (April 19, 1984)
- North Slope to Anchorage (April 20, 1984)
- Anchorage to Valdez (April 20, 1984)
- Valdez to Anchorage (April 21, 1984)
- Anchorage to Juneau (April 21, 1984)
- Juneau to Mindt Air Force Base (April 21, 1984)
- Mindt Air Force Base to Washington D.C. (April 22, 1984)

On the evening of April 16, 1984, after flying from Sitka to Juneau on a government

[44] 11 C.F.R. § 106.3(d).
[45] Explanation and Justification of the Disclosure Regulations (Jan. 12, 1977), at 50 (emphasis added).
[46] *See* Matter Under Review 1729 (Young), *available at* http://www.fec.gov/MUR/.
[47] *See id.*, Flight Itinerary, at 92-94.

aircraft, Congressman Young attended a campaign fundraiser in Juneau. He did not report the cost of the flight from Sitka to Juneau on April 16 as an "expenditure."[48] After initially finding "reason to believe" that the failure to report the travel expense violated the Act, the OGC reversed course and found that the exception at section 106.3(d) applied to the flight from Sitka to Juneau, in addition to the flights between Washington D.C. and Mindt Air Force Base.[49]

MUR 1729 confirms that section 106.3(d) applies to any flight that is part of the trip between the Member's district and Washington D.C. Because the flights at issue in this matter were part of the trip between Congresswoman Pingree's district and Washington D.C., the cost of the flights was not an "expenditure" and was not subject to the Act's prohibitions and limits.

C. Proceeding in this Matter Would Raise Grave Due Process Concerns

The OGC's Factual and Legal Analysis is at odds with the conclusion that the Commission reached in Advisory Opinions 2002-5 and 2011-2, and the enforcement posture that the OGC adopted in MURs 1729 and 6127. Proceeding with this enforcement action in the face of contrary precedent – upon which Respondents and other similarly situated persons have relied – would be manifestly unfair and raise grave due process concerns.

On numerous occasions, the Commission has resisted the OGC's invitation to proceed with an enforcement action in the face of conflicting precedent. In these circumstances, the Commission has expressed several concerns. First, "[t]he regulated community ... ha[s] no fair warning of Commission enforcement policy ...."[50] Second, proceeding against conduct that an advisory opinion had held to be permissible would violate 2 U.S.C. § 437f(c)(2), unless and until the opinion was formally superseded.[51] Third, proceeding in some enforcement actions, but not others, would be "arbitrary and

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[48] Because the payment was made by the Federal government, it was not subject to the Act's contribution limits. However, had the exception at section 106.3(d) not been available, Congressman Young would have been required to report the expenditure on his FEC reports. *See id.*, First General Counsel's Report (Aug. 10, 1984), at 56.

[49] *See id.*, General Counsel's Report (Jan. 3, 1985), at 28-29.

[50] Statement of Reasons of Commissioners Bradley A. Smith, David M. Mason, and Michael E. Toner, Matter Under Review 5369 (Aug. 15, 2003), at 5. *See also* Statement of Reasons of Commissioners Lee Ann Elliott and David M. Mason, Matter Under Review 4687 (Jan. 20, 1999), at 3 (the "lack of notice to the regulated community and opportunity for it to be heard ...may offend the due process clause.").

[51] *See* Statement of Reasons of Karl J. Sandstrom, Matters Under Review 4553, 4671, 4407, 4544, and 4713 (June 21.2000), at 2 ("No reading of the law as it existed when these advertisements were aired would have provided the parties with fair notice of the standard that the staff has subsequently suggested should be applied ... The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech."); Statement of Reasons of Karl J. Sandstrom, Matter Under Review 4538 (Aug. 12, 2002) ("In light of the Commission's failure to formally supersede Advisory Opinion 1995-25, I voted not to proceed against the respondents in this MUR because of the same concerns about due process I have consistently raised in enforcement matters relating to media advertisements alleged to be coordinated between candidates and party committees.").

capricious" under the Administrative Procedure Act.[52]

These concerns are present here. This is the first time that the Commission has proceeded against a candidate for accepting a personal gift of non-commercial travel from her fiancé. Even more troubling, the OGC's position is at odds with the conclusions that the Commission articulated in Advisory Opinions 2002-5 and 2011-2, and that the OGC adopted in MUR 6127. When the Commission believes that an act of Congress or a Commission regulation supersedes a prior advisory opinion, its standard practice is to expressly state this in an Explanation and Justification, or some other policy statement.[53] Its failure to do so when it passed the HLOGA regulations signaled to the regulated community that it could continue to rely on Advisory Opinion 2002-5. The Commission's re-affirmation of that opinion in MUR 6127 and Advisory Opinion 2011-2 provided an even stronger signal that the opinion remained good law after HLOGA.

The MUR process is *not* "an opportunity to obtain some sort of legal precedent which was apparently unattainable through more traditional and appropriate channels."[54] If the Commission believes – despite all evidence to the contrary – that HLOGA supersedes the guidance it has previously issued in this area of law, it must articulate this new position in a rulemaking or policy statement before proceeding with an enforcement action. It should not penalize candidates and committees that relied on its previous guidance, and had no notice that the Commission was poised to "take a sudden U-turn" in its view of the law.[55]

Indeed, this is what the Commission has done in the past. In MUR 4250, for example,

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[52] Statement of Reasons of Commissioner David M. Mason, Matters Under Review 4568, 4633, 4634, and 4736 (Jan. 22, 2003), at 2-3 ("Fundamental fairness is also implicated here by the principle of treating like cases alike. The Commission would be exposed to attack if it went forward as to these particular respondents because our actions are subject to judicial review by the arbitrary and capricious standard under the Administrative Procedure Act. A Commission decision will be considered arbitrary if we 'treat like cases differently.'"); Statement of Reasons of Chairman David M. Mason and Commissioners Darryl R. Wold and Bradley A. Smith, Matter Under Review 4994 (Jan. 11, 2002), at 3 ("Proceeding in this case at this time would be unfair to the respondents because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against them but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances.").

[53] *See, e.g.* Explanation and Justification for Final Rule, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 F.R. 24375, 24382 (May 5, 2010) ("The Commission has addressed the issue of participation by Federal candidates and officeholders in non- Federal fundraising events in Advisory Opinions 2007–11 (California State Party Committees), 2005–02 (Corzine II), 2004–12 (Democrats for the West), 2003–36 (Republican Governors Association), and 2003–03 (Cantor). As explained below, the Commission is superseding the aspects of these advisory opinions that address this issue."); Explanation and Justification for Final Rule, Leadership PACs, 68 F.R. 67013, 67017-18 (Dec. 1, 2003) ("Thus, the final rules supersede Advisory Opinions 1978–12, 1984–46, 1987–12, 1990–7, 1991–12, and 1993– 22, only to the extent these advisory opinions suggest that an authorized committee can be affiliated with an unauthorized committee.").

[54] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, Matter Under Review 5541 (June 1, 2009), at 17.

[55] Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 5724 (Dec. 11, 2009), at 7.

the Commission rejected the OGC's recommendation that the Commission find probable cause that the Republican National Committee and its then-Chairman, Haley Barbour, accepted illegal contributions from foreign nationals. The OGC's theory of wrongdoing depended, in part, on applying a tax law concept, which had not been applied in the context of campaign finance law. In their Statement of Reasons, three Commissioners rejected this approach, citing their "reservation about adopting a doctrine that has not been relied on before by the Commission or the courts in applying the provisions of FECA for the first time in an enforcement action. That procedure raises significant questions about fair notice to the regulated community and, hence, questions of due process."[56] Likewise, in a recent enforcement action against a candidate who allegedly received an excessive contribution from a parent, two Commissioners concluded that the Commission's guidance had been so "hopelessly muddled" that "respect for due process and fundamental fairness demand[ed]" that the Commission not penalize candidates until it "articulate[d], either by rule or through policy statement, the permissible boundaries relating to family gifts."[57]

In situations, such as this one, where past Commission actions would lead a reasonable person to conclude that conduct at issue is permissible and where proceeding with the enforcement action necessarily relies on a heretofore unannounced interpretation of the Act, the Commission has traditionally exercised its prosecutorial discretion and opted not to proceed with the matter. It should so here again.

D. Proceeding in this Matter Would Serve No Compelling Governmental Interest

Additionally, proceeding against Respondents serves no compelling governmental interest. The Supreme Court has recognized only one state interest to justify the Act's prohibitions and limits: preventing corruption or the appearance of corruption.[58] When Congress passed HLOGA in 2007 and when the House of Representatives amended Rule 23 of the House Ethics Rules to restrict the use of non-commercial aircraft, the bill sponsors made clear that preventing corruption or its appearance was the purpose of the bill. The "intent of Section 601 of HLOGA was frequently characterized by its sponsors as an effort to end subsidization of air travel provided by corporations and others to candidates, and thereby reduce the potential for corruption or the appearanoe thereof."[59] As the Senate considered HLOGA, then-Senator Obama said, "these corporate jets ... provide undue access for the lobbyists and corporations that offer them ... Most of the time we have lobbyists riding along with us so they can make their company's case for a particular bill or a particular vote."[60] On the House side, then-chairman of the Rules Committee, Congresswoman Slaughter announced, "While the rules package of the 109th

[56] Statement of Reasons of Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott and David Mason, Matter Under Review 4250 (Feb. 11, 2000), at 10.
[57] Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter, Matter Under Review 5724, at 2.
[58] *See Citizens United v. FEC*, 130 S.Ct. 876, 909 (2010).
[59] 74 F.R. at 63952, n. 4.
[60] 153 Cong. Rec. S. 263 (daily ed. Jan. 9, 2007) (statement of Sen. Obama).

Congress effectively embraced corrupt practices, this package stamps them out. Today and tomorrow we are introducing a series of critical new rules, legislation that will help guarantee that the unethical practices of the past will have no place in our future."[61]

To prevent corruption or its appearance, the House of Representatives enacted a comprehensive scheme to restrict the use of non-commercial aircraft, to be enforced by both the House Ethics Committee and the Commission. In January of 2007, the House passed H.R. 5, which amended Rule 23 of the House Ethics Rules to bar the "use personal funds, official funds, or campaign funds for a flight on a non-governmental airplane that is not licensed by the Federal Aviation Administration to operate for compensation or hire."[62] In May of the same year, the House passed H.R. 363, which further amended Rule 23 to exempt from this ban travel on aircraft owned by the Member or a "family members," and travel on aircraft for "personal use" supplied by an individual on the basis of "personal friendship."[63] Notably, the ban on non-commercial travel was not part of the HLOGA bill that the House initially passed on May 24, 2007. The ban first appeared in Section 601 of the final bill that the House passed on July 31, 2007.[64]

In this enforcement scheme, the House Committee on the Standards of Official Conduct (since renamed as the House Committee on Ethics) plays a crucial role. On September 24, 2010, the Committee determined that the flights at issue – and others like them – did not violate the House Ethics Rules. The Committee determined that, while the flights are "gifts" under the Rules, they qualify for the exception afforded to gifts from a "relative,"[65] which includes a Member's fiancé.[66] Significantly, the Committee found House Rule 23 to be inapplicable here because it "governs only the permissibility of a Member paying or reimbursing for the cost of a flight on a private plane" and is "inapplicable where a Member is receiving such a flight as a gift that is otherwise acceptable under the gift rule."[67]

As interpreted by the Committee, the regulatory scheme enacted by the House in 2007 does not prohibit a Member's fiancé from making a *gift* of non-commercial travel, made irrespective of candidacy, to the Member. There is no compelling justification for the Commission to extend the regulatory scheme to cover such gifts. Nothing in the legislative history suggests that the House intended Section 601 to be more restrictive than the parallel ban in Rule 23 of the House Ethics Rules. As Respondents explained in their initial response, the HLOGA regulations and the House Ethics Rules prevent Members from accepting a flight on noncommercial aircraft unless (i) the payment for the flight is not an "expenditure" under the Act *and* (ii) the flight falls within one of the

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[61] 153 Cong. Rec. H8 (daily ed. Jan. 4, 2007) (statement of Rep. Slaughter).
[62] H.R. Res. 6, 110th Cong. (Jan. 5, 2007).
[63] H.R. Res. 353, 110th Cong. (May 2, 2007).
[64] *See* H.R. 2316, 110th Cong. (May 24, 2007).
[65] *See* Letter from Reps. Zoe Lofgren and Jo Bonner to Rep. Chellie Pingree (Sept. 24, 2010), citing House Rule 25, cl. 5(a)(3)(C), *available at* http://www.bangordailynews.com/external/Pingree/standardscommittee.house.gov.pdf.
[66] Ethics in Government Act § 109(16).
[67] *See* Letter from Reps. Lofgren and Bonner, at n. 7.

narrow exceptions to the House gift rules. The instances in which a flight satisfies both of these criteria – as they do here – are rare.

Under Supreme Court precedent, the only justification to extend the regulatory scheme to cover such gifts is the threat of corruption or its appearance. But the provision of free air travel to a Member from her fiancé does not present any such threat. As the Supreme Court has said, "the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or his immediate family."[68] Although "[t]he Commission has yet to adopt an approach in matters involving family gifts that adequately takes into account the reduced risk of corruption posed by such gifts and the constitutional right of a candidate to spend an unlimited amount of personal funds on his or her election," several Commissioners have recently shown a proclivity toward dismissing matters involving such intra-familial transfers.[69]

Here, too, the Commission should recognize the non-existent threat of corruption or its appearance, and dismiss the matter. The Commission has, in the past, declined to exercise its regulatory authority in areas where the threat of corruption is non-existent and the activity is regulated by other bodies of Federal law, including congressional ethics rules. In 2002, for example, the Commission issued an interpretive rule clarifying that its mixed purpose travel allocation regulations did not apply to the extent that the candidate's travel was paid for with funds appropriated by the Federal government.[70] The Commission willingly ceded this regulatory space, in large part, because "the use of Federal funds is governed by general appropriations law and is subject to Congressional oversight."[71] The same approach is warranted here.

III. The Reason to Believe Findings Against Magic Carpet Enterprises LLC and Mr. Sussman Should be Withdrawn

The reason to believe finding against Magic Carpet Enterprises LLC ("Magic Carpet") and Mr. Sussman, in his capacity as owner and principal officer, should be withdrawn. As described in more detail in Footnote 2, Mr. Sussman paid for these flights; Magic Carpet did not. Because it did not make a payment for the flights, Magic Carpet did not violate 2 U.S.C. § 441b(a) and Mr. Sussman did not violate 2 U.S.C. § 441b(a) or 11 C.F.R. § 114.2(e).[72]

The reason to believe finding against Mr. Sussman, in his personal capacity, should also

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[68] *Buckley v. Valeo*, 424 U.S. 1, 53 (1976), quoting *Buckley v. Valeo*, 519 F.2d 821, 855 (D.C. Cir. 1975).
[69] *See* Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter, Matter Under Review 5724 (Dec. 11, 2009), at 3; Statement of Reasons of Chairman Bradley A. Smith and Commissioner Michael E. Toner, Matter Under Review 5321 (July 27, 2004), at 3; Statement of Reasons of Commissioners Bradley A. Smith and Michael E. Toner, Matter Under Review 5138 (June 12, 2003), at 2.
[70] *See* Interpretation of Allocation of Candidate Travel Expenses, 67 F.R. 5445, 5445-46 (Feb. 6, 2002).
[71] *Id.*
[72] Additionally, Magic Carpet is an LLC that is taxed as a partnership for IRS purposes and, thus, is not subject to 2 U.S.C. § 441b(a). *See* 11 C.F.R. § 110.1(g)(2).

be withdrawn. The complaint by the Maine Republican Party did not list Magic Carpet or Mr. Sussman as Respondents.[73] While the Commission added Magic Carpet as a Respondent, served it with the complaint, and provided it with an opportunity to respond, the Commission did *not* name Mr. Sussman as a Respondent; did *not* serve him with a complaint in his personal capacity; and, therefore, did *not* provide him with an opportunity to respond.[74]

The Act prohibits the Commission from finding reason to believe against any party without providing that party with an opportunity to respond to the complaint. On several occasions, the Commission has determined that it was inappropriate to find reason to believe against a person where that person was not properly named as a Respondent in the complaint.[75] The Act provides that, "[w]ithin 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation."[76] Furthermore, "[b]efore the Commission conducts *any vote* on the complaint, other than a vote to dismiss, any person so notified *shall have the opportunity to demonstrate, in writing, to the Commission* within 15 days after notification that no action should be taken against such person on the basis of the complaint."[77] This requirement is not optional; the "Commission needs to scrupulously comply with this requirement in all matters."[78]

By finding reason to believe that Mr. Sussman violated the Act, without providing him an opportunity to respond, the Commission plainly violated 2 U.S.C. § 437g(a)(1). To rectify this violation, the Commission should withdraw the reason to believe finding against Mr. Sussman and immediately dismiss the matter with respect to him.

IV. Conclusion

Nothing in the Act, the regulations, or the Commission's precedents supports a probable cause finding in this matter. For the reasons set forth above, the Commission should not find probable cause that a violation occurred and should close the file on this matter. Additionally, for the reasons set forth above, the Commission should withdraw the reason to believe findings against Magic Carpet and Mr. Sussman.

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[73] *See* Letter from FEC to Magic Carpet Enterprises, LLC (Oct. 15, 2010), attached as Exhibit B.
[74] *Id.*
[75] Statement of Reasons of Chairman Mason and Commissioners Wold and Smith, Matter Under Review 4994 (Jan. 11, 2002), at 3-4 ("we conclude that reason-to-believe findings were inappropriate because these entities were not properly respondents to the complaint."); Statement of Reasons of Vice-Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Matter Under Review 6056 (June 1, 2009), at 12 ("The failure to provide a respondent with an opportunity to respond to factual and legal allegations that the Commission will consider in making its RTB determination undermines the command that '[t]he Commission shall not take any action, or make any finding, against a respondent ...unless it has considered [its] response ....'").
[76] 2 U.S.C. § 437g(a)(1).
[77] *Id.* (emphasis added).
[78] Statement of Reasons of Vice-Chairman Petersen and Commissioners Hunter and McGahn, Matter Under Review 6056, at 12.

Very truly yours,

Marc E. Elias /sb

Marc E. Elias
Counsel for Respondents

Exhibit A

Stamp This Copy
and Return it To
Perkins Coie

Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

Marc Erik Elias
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November 29, 2010

Christopher Hughey
General Counsel
Federal Election Commission
999 E Street, NW, 6th Floor
Washington DC 20463

Re: MUR 6394

Dear Mr. Hughey:

This constitutes the response of Pingree for Congress, Anne Rand, as Treasurer, Rochelle M. Pingree, and Magic Carpet Enterprises LLC (collectively, the "Respondents") to the complaint filed by the Maine Republican Party (the "Complainant") on October 6, 2010. For the reasons set forth below, this complaint should be dismissed.

I. Factual Background

On September 13, 2010, Congresswoman Rochelle M. Pingree took a personal trip from Portland, Maine to White Plains, New York with her fiancé, Donald Sussman. The couple flew on a jet (hereinafter, "the jet") owned by Magic Carpet Enterprises, LLC, a limited liability company owned entirely by Mr. Sussman. The jet took off from Portland and landed at the Westchester County Airport in White Plains, New York at 1:20 p.m. (hereinafter, "Flight 1").

The purpose of the trip was personal. Due to their busy schedules, it is not uncommon for Mr. Sussman (who often has meetings in New York) and Ms. Pingree to fly to New York together for an afternoon or evening, so that they can have extra time together before Ms. Pingree returns to Washington D.C. These trips also offer Ms. Pingree an opportunity to visit with her son and grandson, who both live in New York. On September 13, 2010, Mr. Sussman had a personal meeting in New York that he wanted Ms. Pingree to attend with him. After attending this meeting, Ms. Pingree visited with her son and grandson. Finally, at the end of the day, Ms. Pingree went to a campaign fundraiser on the East Side of Manhattan. After the fundraiser ended, Mr. Sussman and Ms. Pingree drove back to the Westchester County Airport, arriving in time to take a 9:22 p.m. flight to Dulles International Airport (hereinafter, "Flight 2").

II. Legal Discussion

The Complainant alleges that, by traveling on the jet on September 13, 2010, Ms. Pingree violated the Honest Leadership and Open Government Act ("HLOGA").

This allegation is without merit. When assessing whether a flight is subject to HLOGA, the key question is whether the cost of the flight constitutes a campaign "expenditure" under the Federal Election Campaign Act of 1971, as amended (the "Act"). Because the primary purpose of the trip was personal, and because Mr. Sussman would have invited Ms. Pingree to accompany him irrespective of her candidacy, the cost of Flights 1 and 2 was *not* an "expenditure" under the Act.

Any other conclusion would be contrary to Commission precedent. In 2002, the Commission concluded that a flight from the candidate's hometown to Washington D.C. was not a campaign "expenditure" – even though the candidate planned to engage in campaign activity while in Washington D.C. – because the primary purpose of the trip was not campaign-related and the candidate would have taken the flight irrespective of her candidacy.[1] The same rule governs here. Because the cost of Flights 1 and 2 was not an "expenditure," HLOGA does not apply. Consequently, the complaint should be dismissed.[2]

A. The HLOGA regulations apply only to flights on noncommercial aircraft, when the cost of the flights constitutes an "expenditure" under the Act.

HLOGA – and the Commission's regulations implementing it (hereinafter, the "HLOGA regulations") – generally prohibit "House candidates, their authorized committees, and their leadership PACs from *making any expenditure* for noncommercial travel on aircraft."[3] HLOGA's requirements "apply only to travel *expenditures* of federal candidates, their authorized committees, House leadership PACs, and other political committees making in-kind contributions to federal candidates in the form of travel payments."[4] They do not apply to

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[1] *See* Advisory Opinion 2002-5 (Hutchinson).

[2] The complaint does not name Magic Carpet Enterprises as a Respondent. The Commission's letter to Magic Carpet Enterprises dated October 15, 2010 states that "the Federal Election Commission received a complaint that indicates that Magic Carpet Enterprises may have violated the Federal Election Campaign Act of 1971, as amended ("the Act")." The letter does not specify which provision in the Act that Magic Carpet Enterprises may have violated. This makes it difficult for Magic Carpet Enterprises to formulate a response to the letter. Because the cost of the flights was not an "expenditure" under the Act, however, neither flight was subject to the restrictions or limitations of the Act. Consequently, the complaint against Magic Carpet Enterprises should be dismissed.

[3] *See* Campaign Travel, 74 F.R. 63951, 63952 (Dec. 7, 2009) (emphasis added).

[4] *See* Commissioner Matthew Petersen, FEC Implemented Congress' Vision on Travel Rules, Roll Call (Dec. 1, 2009), *available at* http://www.rollcall.com/issues/55_62/-40988-1.html (last visited on November 22, 2010) (emphasis added).

personal travel.

B. When determining whether a travel expense is an "expenditure", the "personal use" regulations govern.

In 1977, the Commission promulgated regulations governing so-called "mixed purpose travel," *e.g.* travel that had both campaign and non-campaign purposes. Under these regulations, each trip was divided into "campaign-related" and "non-campaign related" stops. The cost of the trip was then "calculated on the actual cost-per-mile of the means of transportation actually used, starting at the point of origin of the trip, via every campaign-related stop and ending at the point of origin."[5] The expenses allocable to "campaign-related" stops were treated as reportable "expenditures." Notably, if a candidate conducted any campaign-related activity in a stop, the stop was considered "campaign-related" and *all* travel expenditures to and from that stop would be treated as reportable expenditures.[6] For these purposes, where a candidate made one "campaign-related" appearance in a city, the trip to that city was considered "campaign-related."[7]

At the time the Commission issued these regulations in 1977, the Act permitted Federal candidates to convert campaign funds to personal use. Under the 1977 regulations, for example, a candidate could use campaign funds to pay for travel to or from any "campaign-related stop," regardless of how much personal activity took place at that stop.[8] However, over the next decade, Congress amended the Act to forbid the conversion of campaign funds to personal use.[9]

In response to Congress' clear directive, the Commission promulgated new regulations in 1995. These regulations took a different approach to "mixed purpose" travel. Rather than assign each stop an explicit "campaign" or "non-campaign" purpose, these regulations mandate that "[i]f a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder-related activities, the incremental expenses that

[5] 11 C.F.R. § 106.3(b)(2).

[6] 11 C.F.R. § 106.3(b)(3). However, "[c]ampaign-related activity shall not include any incidental contacts." *Id.*

[7] *See* Explanation and Justification of the Disclosure Regulations (Jan. 12, 1977), at 50. *See also* Advisory Opinions 1992-34 (Castle) and 1994-37 (Schumer).

[8] *See* Advisory Opinion 2002-5 (noting that without considering the personal use regulations, "the regulations at 11 CFR 106.3(b)(3) [would] seem to require that, rather than just a portion, the entire amount of the travel expenses for the trip would be considered campaign related, unless the campaign related portion is incidental.").

[9] *See* 2 U.S.C. § 439a(b)(1) ("A contribution or donation described in subsection (a) shall not be converted by any person to personal use.").

result from the personal activities are personal use."[10]

In 2002, the Commission was asked, for the first time, to reconcile these two sets of regulations. Ann Hutchinson, the Mayor of Bettendorf, Iowa and a U.S. House candidate, was planning to travel to Washington D.C. as part of a four-city mayoral delegation to meet with elected officials regarding local issues. In addition to attending these meetings in her mayoral capacity, Mayor Hutchinson also planned to engage in campaign activity (*e.g.* meet with Democratic Party officials regarding her candidacy) and personal activity (*e.g.* engage in sightseeing) while in Washington D.C.

Under the 1977 regulations, the *entire* cost of Mayor Hutchinson's trip – including the airfare to and from Washington D.C. – could have been treated as an "expenditure" to be paid with campaign funds, even though the primary purpose of the trip was not campaign-related. In Advisory Opinion 2002-5, however, the Commission determined that such an outcome would be inconsistent with the "personal use" restrictions, because it would result in campaign funds being used to pay for *non*-campaign activities:[11]

> Section 106.3(b)(3) and the advisory opinions applying the regulation predate the current personal use regulations. It is significant that section 106.3, promulgated in 1977, reflects a policy which was also less restrictive regarding the personal use of campaign funds. This personal use approach was substantially altered in 1995 when the Commission adopted the current personal use regulations at Part 113. ***Therefore, when applying 11 CFR 106.3(b)(3), the Commission's more recent policy concerns and interpretations regarding the personal use prohibition must be given greater significance.***

Ultimately, the Commission concluded that "rather than treating [an] entire trip as campaign related pursuant to 106.3(b)(3), the approach in section 113.1(g) would be incremental."[12]

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[10] 11 C.F.R. § 113.1(g)(1)(ii)(C). The "increased costs would be calculated by determining the cost of a fictional trip that includes only the campaign and officeholder related stops, that is, a trip that starts at the point of origin, goes to every campaign related or officeholder related stop, and returns to the point of origin. The difference between the transportation costs of this fictional, campaign related trip and the total transportation costs of the trip actually taken is the incremental cost attributable to the personal leg of the trip." Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 F.R. 7862, 7869 (Feb. 9, 1995).

[11] *See* Advisory Opinion 2002-5 (emphasis added).

[12] *Id.* As the Commission has made clear, previous opinions addressing section 106.3(b) are likely obsolete. *See id.*, n. 7 (noting that "[a]n incremental approach toward travel expenses of trips with multiple purposes departs from the interpretation of 11 CFR 106.3(b)(3) in Advisory Opinions 1992-34 and 1994-37. Therefore, the portions of these two opinions dealing with section 106.3(b)(3) that are inconsistent with the analysis adopted in this opinion are hereby superseded.").

Because it has not been superseded by any subsequent advisory opinions, Advisory Opinion 2002-5 provides the most appropriate framework with which to analyze Flights 1 and 2.

C. Because the primary purpose of Ms. Pingree's trip was not campaign-related and because Mr. Sussman would have paid for the flight irrespective of Ms. Pingree's candidacy, the cost of Flights 1 and 2 did not constitute an "expenditure."

When a third party pays for a personal expense that would have existed irrespective of candidacy, the Commission applies section 113.1(g)(6) to determine whether the payment is a campaign "expenditure." This section of the regulations – known as the "third party payment" provision – states that "[n]otwithstanding that the use of funds for a particular expense would be a personal use ... payment of that expense by any person other than the candidate or the campaign committee shall be a contribution ... *unless the payment would have been made irrespective of the candidacy.*"[13] As the Commission noted in 2008, the "third-party payment provision asks whether the payment would have been made by the third party irrespective of the Federal candidate's candidacy for office. In other words, would the third party pay the expense if the candidate was not running for Federal office? If the answer is yes, then the payment does not constitute a contribution."[14]

In Advisory Opinion 2002-5, the Commission applied this test to determine whether Bettendorf, Iowa – rather than Mayor Hutchinson's campaign – could pay for the flight from Washington D.C. to Iowa. Noting that a "a slightly different approach would apply to the cost of the actual airfare to Washington," the Commission determined that "[b]ecause the airfare represents a defined expense that would have existed irrespective of any personal or campaign related activities, the entire cost of the ticket may be paid for by City with no obligation by Ms. Hutchinson or her campaign committee to reimburse the City."[15] In other words, because the third party would have paid for the flight irrespective of Mayor Hutchinson's candidacy, it was not a campaign "expenditure" and did not have to be paid with campaign funds.

Likewise, because the cost of Flights 1 and 2 would have existed irrespective of the campaign fundraiser, it was not an "expenditure." The purpose of the September 13, 2010 trip was personal in nature. Mr. Sussman and Ms. Pingree are engaged to be married. Since their relationship began, Mr. Sussman and Ms. Pingree have traveled on the jet on numerous occasions for personal reasons, including several trips to the New York area. On September 13, 2010, Mr. Sussman had a personal meeting in New York that he wanted Ms. Pingree to attend

[13] 11 C.F.R. § 113.1(g)(6) (emphasis added).

[14] *See* Advisory Opinion 2008-17 (KITPAC).

[15] *See* Advisory Opinion 2002-5.

with him. Ms. Pingree also wanted to visit with her son and grandson, as she typically does when she is in New York. Because Mr. Sussman allowed Ms. Pingree to fly on the jet for non-campaign purposes on many occasions prior to September 13, 2010, there is no doubt that Mr. Sussman would have asked Ms. Pingree to join him on his September 13, 2010 trip – and that Ms. Pingree would have accepted this invitation – even if there had been no fundraiser on her schedule.[16]

Just as Mayor Hutchinson did not have to use campaign funds to pay for the flight to Washington D.C., Ms. Pingree was not required to use her campaign funds to pay for Flight 1 or Flight 2. Consequently, the cost of the flights was not an "expenditure" and the HLOGA regulations do not apply.

D. The House Ethics Rules further limit the extent to which Members can accept free air travel for non-campaign purposes.

By allowing Members to fly on noncommercial aircraft for non-campaign purposes, the Commission is not at risk of inadvertently undermining the HLOGA regulations. Under House Ethics Rules, Ms. Pingree is able to accept free travel on the jet, only because she is Mr. Sussman's fiancée.[17] In most instances, the House Ethics Rules would prohibit Members from accepting free travel on noncommercial aircraft for non-campaign purposes.

In its letter to Ms. Pingree, for example, the Standards Committee wrote:[18]

> Accordingly, a House Member, officer, or employee may accept an unlimited number of gifts, of any dollar value, from the individual's fiancé. The exception would permit the acceptance of unlimited gifts of transportation, including travel by private aircraft, where the donor is the fiancé of the recipient.

The letter made clear however, that if Mr. Sussman were *not* Ms. Pingree's fiancé – and the flights did not qualify for another exception – the flights would have been impermissible under the House Ethics Rules.[19]

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[16] *See, e.g.*, 11 C.F.R. § 113.1(g)(6)(iii) (noting that payments would not be considered "contributions" or "expenditures" if "[p]ayments for that expense were made by the person making the payment before the candidate became a candidate.").

[17] The House Committee on Standards of Official Conduct confirmed this in an informal opinion issued to Ms. Pingree in 2009 and again in a formal written opinion issued on September 24, 2010.

[18] *See* Letter from Reps. Zoe Lofgren and Jo Bonner to Rep. Chellie Pingree (Sept. 24, 2010), *available at* http://www.bangordailynews.com/external/Pingree/standardscommittee.house.gov.pdf.

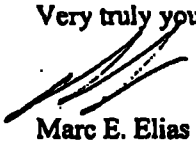
[19] *Id.*, citing House Rule 25, cl. 5(a)(1)(A)(i).

When viewed in tandem, the HLOGA regulations and the House Ethics Rules prevent Members from accepting a flight on noncommercial aircraft unless (i) the cost of the flight is not an "expenditure" under the campaign finance laws *and* (ii) the offer of the flight is exempt from the restrictions in House Rule 25. The instances in which a flight satisfies both of these criteria – as both Flight 1 and Flight 2 do – are likely to be rare. Thus, by allowing Members to fly on noncommercial aircraft with their relatives for non-campaign purposes, the Commission is not at risk of inadvertently undermining the HLOGA regulations.

III. Conclusion

The HLOGA regulations do not prohibit a U.S. House candidate from taking a personal trip on a noncommercial aircraft. Because the cost of Flights 1 and 2 was not an "expenditure" by Ms. Pingree's campaign, the HLOGA regulations are inapposite. Consequently, this complaint should be dismissed.

Very truly yours,



Marc E. Elias

cc: Frankie D. Hampton, Paralegal
Complaints Examination and Legal Administration

Exhibit B

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 29, 2010

Marc E. Elias
Perkins Coie LLP
607 14H Street, NW
Suite 800
Washington, DC 20005

RE: MUR 6394
Pingree for Congress, Anne Rand, Rochelle M. Pingree and Magic Carpet Enterprises, LLC

Dear Mr. Elias:

This is in response to your letter dated October 29, 2010, which we received that day requesting an extension to respond to the complaint filed in the above-noted matter. After considering the circumstances presented in your letter, the Office of General Counsel has granted the requested extension. Accordingly, your response is due by the close of business on or before November 29, 2010.

If you have any questions, please contact me on our toll-free telephone number, (800) 424-9530. Our local telephone number is (202) 694-1650.

Sincerely,

Frankie D. Hampton

Frankie D. Hampton, Paralegal
Complaints Examination and
Legal Administration

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 15 2010

S. Donald Sussman
Magic Carpet Enterprises, LLC
66 Brown Road
Ithaca, NY 14850

Re: MUR 6394

Dear Mr. Sussman:

The Federal Election Commission received a complaint that indicates the Magic Carpet Enterprises, LLC may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 6394. Please refer to this number in all future correspondence.

Under the Act you have the opportunity to demonstrate in writing that no action should be taken against the Magic Carpet Enterprises, LLC in this matter. Please submit any factual or legal materials that you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission. Please note that you have a legal obligation to preserve all documents, records and materials relating to the subject matter of the complaint until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you have any questions, please contact Frankie D. Hampton at (202) 694-1650 or toll free at 1-800-424-9530. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,

Jeff S. Jordan
Supervisory Attorney
Complaints Examination &
Legal Administration

Enclosures:
1. Complaint
2. Procedures
3. Designation of Counsel Statement

State Chairman Charles E. Webster
Treasurer William P. Logan
Secretary Charles L. Nabelek
National Committeeman Richard A. Bennett
National Committeewoman Jan M. Staples
Executive Director Christie-Lee McNally

WORKING PEOPLE Vote REPUBLICAN

October 6, 2010

SENSITIVE
MUR # 6394

Dear Sirs or Madams:

Enclosed is a complaint from the Maine Republican Party against Maine Congresswoman Chellie Pingree. We are filing this based on evidence of Federal Election law violations.

We appreciate your consideration of this issue, and please contact us if we can provide more information.

Sincerely,

Charlie Webster
Chairman, Maine Republican Party

BEFORE THE FEDERAL ELECTION COMMISSION
A COMPLAINT

BY

Charles M. Webster,
Chairman, Maine Republican Party
9 Higgins Street
Augusta, Maine 04330

AGAINST

Rochelle "Chellie" M. Pingree,
Congresswoman,
First Congressional District of Maine,
United States House of Representatives

MUR No. 6394

This Complaint is filed with the Federal Election Commission (the "Commission") on behalf of Charles M. Webster, Chairman of the Maine Republican Party ("Complainant") against Rochelle "Chellie" M. Pingree ("Respondent"). Respondent is currently a Congresswoman in the United States House of Representatives from the First Congressional District of Maine and a candidate for federal office. Complainant asserts that in the course of her campaign for reelection, she has violated the Federal Election Campaign Finance Act of 1971 (the "Act"), as amended by the Honest Leadership and Open Government Act of 2007 ("HLOGA"), through impermissible air travel to campaign activities aboard non-commercial private aircraft. *See* Attachments. Based upon news accounts and information and belief, the facts relevant to these violations are as follows:

FACTUAL ALLEGATIONS

1. Magic Carpet Enterprises, LLC is a holding company based in Ithaca, New York, to which a Dassault Falcon 2000EX private corporate jet bearing the tag N888CE (the "Magic Carpet private jet") is registered.

2. Magic Carpet Enterprises, LLC is solely owned by S. Donald Sussman, the founder and chairman of billion-dollar hedge fund Paloma Partners LLC. Mr. Sussman has been alternately labeled by Respondent as her "partner" and her "fiancé." He is not a member of Respondent's family.

3. On the morning of September 13, 2010, Respondent was in Portland, Maine.

4. At 12:31 PM on that same day, the Magic Carpet private jet took off from Portland International Jetport. It landed at 1:20 PM at Westchester County Airport in White Plains, New York, approximately one hour north of New York City.

5. At 6:30 PM on that evening, Respondent was present at a fundraiser for her reelection campaign held in a home located at 150 East End Avenue, New York, New York. The fundraiser was scheduled to end at 8:00 PM.

6. At 9:22 PM, the Magic Carpet private jet took off from Westchester County Airport. At 10:17 PM, it landed at Dulles International Airport in Sterling, Virginia, approximately one hour northwest of Washington, D.C.

7. The next day, September 14, 2010, Respondent was present in the chamber of the House of Representatives.

8. According to a public statement made by Respondent's spokesperson Willy Ritch on September 30, 2010, Respondent was aboard both of the abovementioned Magic Carpet private jet flights.

9. The Magic Carpet private jet was not provided by the Federal government, or by a State or local government on September 13, 2010.

FIRST VIOLATION OF LAW (Count I)

2 U.S.C. § 439a(c)(2), 11 CFR § 100.93(c)(2)

10. Complainant reasserts, as if fully set forth herein, Paragraphs 1 through 9 above.

11. On December 7, 2009, the Commission promulgated Final Rules implementing the HLOGA concerning air travel by members of the United States government.

12. Specifically, campaign travelers, including candidates for the U.S. House of Representatives, are expressly prohibited from engaging in non-commercial air travel aboard private jets for campaign-related activity. *See* 2 U.S.C. § 439a(c)(2), 11 CFR § 100.93(c)(2).

13. The only exceptions to the ban on non-commercial travel are as follows: (1) travel aboard an aircraft owned or leased by the candidate's father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law (the "family member exception"), 2 U.S.C. § 439a(c)(3), 11 CFR § 100.93(g)(4); and (2) travel aboard aircraft provided by the Federal government, or a State or local government (the "government conveyance exception"), 2 U.S.C. § 439a(c)(2)(B), 11 CFR § 100.93(e).

14. Because Mr. Sussman is not related to Respondent in any of the ways described above in Paragraph 13, the family member exception cannot and does not apply.

15. Because the Magic Carpet private jet was not provided by the Federal government, or by a State or local government, the government conveyance exception cannot and does not apply.

16. According to a public statement issued by Respondent's spokesperson Willy Ritch, Respondent was aboard the Magic Carpet private jet when it flew from Portland, Maine to White Plains, New York on September 13.

17. Because this private jet flight was in connection with a fundraiser for Respondent's federal reelection campaign, Respondent was a campaign traveler on the flight.

18. THEREFORE, Respondent explicitly violated the HLOGA when she flew aboard the Magic Carpet private jet from Portland, Maine to New York, New York in order to attend a fundraiser for her reelection campaign.

SECOND VIOLATION OF LAW (Count II)

2 U.S.C. § 439a(c)(2), 11 CFR § 100.93(c)(2)

19. Complainant reasserts, as if fully set forth herein, Paragraphs 1 through 18 above.

20. According to a public statement issued by Respondent's spokesperson Willy Ritch, Respondent was aboard the Magic Carpet private jet when it flew from White Plains, New York to Washington, D.C. on September 13, 2010.

21. Because this private jet flight was in connection with a fundraiser for Respondent's federal reelection campaign, Respondent was a campaign traveler on the flight.

22. THEREFORE, Respondent explicitly violated the HLOGA when she flew aboard the Magic Carpet private jet from White Plains, New York to Washington, D.C. after attending a fundraiser for her reelection campaign.

RELIEF SOUGHT

23. Complainant requests the Commission levy civil penalties against Respondent in accordance with 2 U.S.C. § 437g(a)(5) and 11 CFR § 111.24(a)(2).

24. Because Respondent's flight aboard the Magic Carpet private jet from Portland, Maine to New York, New York was a knowing and willful violation of the HLOGA, the civil penalty for Count I should be a fine in the amount of Sixteen Thousand Dollars ($16,000).

25. Because Respondent's flight aboard the Magic Carpet private jet from New York, New York to Washington, D.C. was a knowing and willful violation of the HLOGA, the civil penalty for Count II should be a fine in the amount of Sixteen Thousand Dollars ($16,000).

26. Complainant requests that the Commission provide all additional relief that it may deem appropriate or equitable.

The above is correct and accurate to the best of our knowledge, information, and belief.

Respectfully submitted,

Charles M. Webster
Chairman, Republican Party of Maine

Sworn and subscribed to in Augusta, Maine on October 6, 2010.

Notary Public

CHRISTIE LEE MCNALLY
MY COMMISION EXPIRES
1/30/2015

My commission expires _____.

- Maine Watchdog - http://maine.watchdog.org -

Pingree Flies On Corporate Jet

Posted By Stephan Burklin On September 23, 2010 @ 5:11 am In Featured,News | 28 Comments

As the President of Common Cause [1], a non-profit citizens' lobbying group, Representative Chellie Pingree criticized lawmakers who traveled on corporate jets.

But Rep. Pingree is engaging in the same activity she derided four years ago.

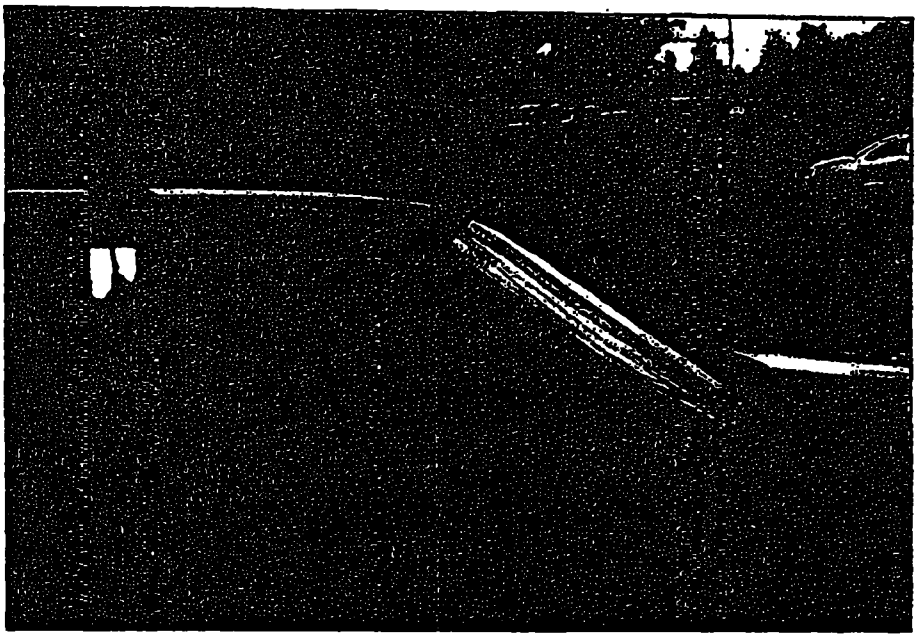
An investigation by MaineWatchdog found that Pingree has been traveling on a private plane owned by the corporation [2] of her significant other, Donald Sussman, Founder and Chairman of Paloma Partners, a billion dollar hedge fund.

When AOL [3] reported in late July that Pingree's office was reimbursed for more travel expenses* than any other house member in 2009, MaineWatchdog asked whether any of those reimbursements were related to travel on private planes [4]. A spokesman for Pingree said: "To my knowledge, the Congresswoman does not fly on privately chartered jets."

The investigation, however, produced a video of Representative Pingree and Sussman disembarking at Portland International Jetport after a flight from Bridgeport, Conn., on September 17, 2010.

Pingree and Sussman landed in Portland at 1:26 p.m., at which point a red carpet was rolled out for them on the non-commercial apron.

A snapshot of the couple driving off confirms that Pingree was on board.



[5]

Prior to her election in 2008, Pingree was an outspoken critic of congressional members who flew on corporate jets.

According to written remarks [6] delivered before the Subcommittee on the Constitution in 2006, Pingree said: "Most Americans never have and never will fly on a chartered jet, much less a fancy corporate jet complete with wet bar and leather couches. So when members of Congress constantly fly around on corporate jets and pay only the cost of a commercial ticket, it contributes to the corrosive public perception that members of Congress are more like the fat cats of Wall Street than they are like the rest of us."

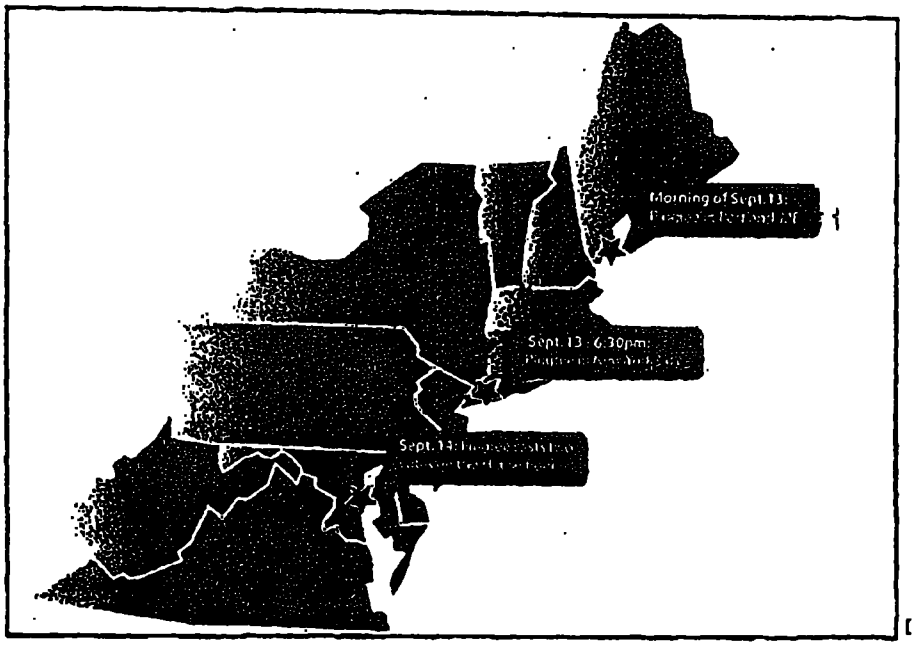
In the aftermath of the Abramoff scandal [7], Pingree lobbied for a tough ethics-reform law that would have, among other things, completely banned privately funded travel [8]. When a weaker bill was introduced, Pingree called the drafted bill "window dressing." [9]

It is not clear whether Pingree's use of Sussman's aircraft was limited to the incident on September 17.

Flight logs of Sussman's plane [10] obtained by MaineWatchdog indicate that Pingree may have used the aircraft on several other occasions.

In several instances, Pingree's trips between Maine and Washington, D.C. closely track the movement of Sussman's plane.

MaineWatchdog uncovered the following facts:

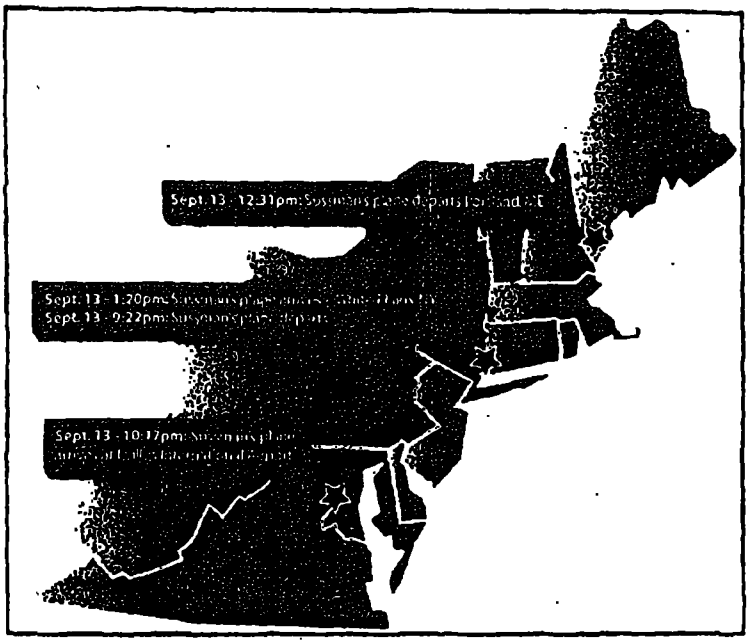


[11]

On the morning of September 13, Representative Pingree visited Presumpscot Elementary School [12] in Portland.

According to flight logs, Sussman's plane took off from Portland International Jetport [13] at 12:31 in the afternoon. Forty-nine minutes later, at 1:20, it landed an hour's drive north of New York City at Westchester County Airport [14] in White Plains, NY.

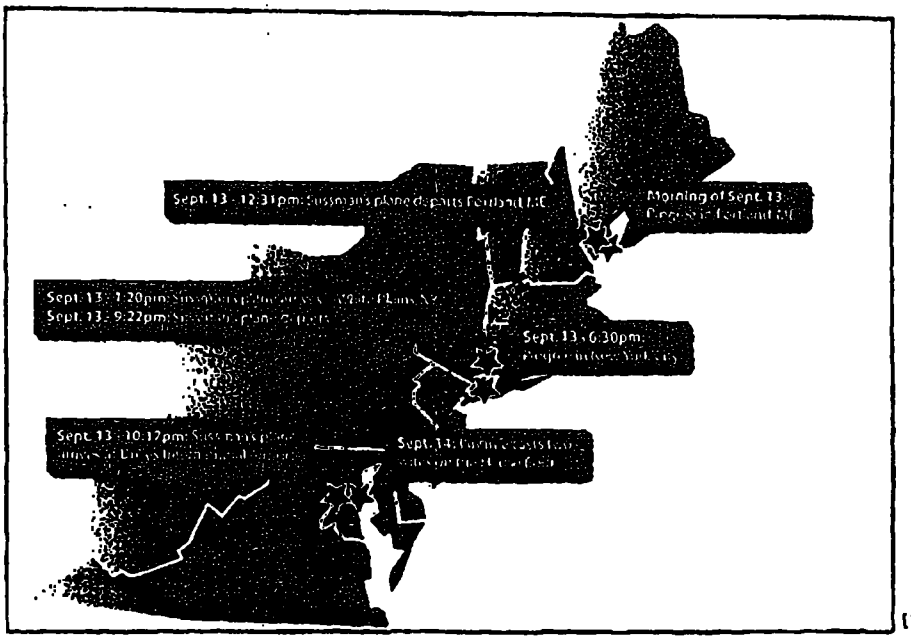
At 6:30 p.m., two prominent New York theater producers threw a house party [15] to raise money for Pingree at their home in the Upper East End. The party was scheduled to end at 8:00 p.m.



[16]

At 9:22 p.m., Sussman's plane lifted off again at Westchester County Airport in White Plains. It landed at Dulles International Airport [17] an hour outside of Washington, D.C., at 10:17 p.m.

The next day, Sept. 14, Pingree cast two votes [18](HR 1571 and HR 1052) in the evening on the House floor in Washington.



[19]

There are other similar cases where Pingree's movement parallels that of Sussman's plane. MaineWatchdog compared Pingree's voting record [18] to the movement of Sussman's plane [10].

On July 24, Pingree was in Brunswick with Gov. Baldacci to celebrate Kestrel Aviation's move to Maine [20].

On July 26, Sussman's plane left Knox County Regional Airport [21] in Rockland, the closest airport to Pingree's home in North Haven [22], at 12:51 pm. Pingree was on the House floor at around 6:30 to vote on HR 1320. She also appeared on Hardball [23] with Chris Matthews that afternoon.

She was in Washington for votes on July 27, 28, and 29.

On July 30, Pingree was on the House floor. The last vote of the day was at around 6:30 p.m. At 7:39, Sussman's plane left Washington, D.C. for Rockland, Maine.

On August 6th, Pingree attended the Maine Lobster Fest Parade [24] in Rockland.

On August 9, Sussman's plane departed Rockland for D.C. at 2:33 pm. The next day, Pingree was present in the Oval Office when President Obama signed the $26 billion aid package [25] for states. Sussman's plane departed D.C. on August 10 at 7:16 pm and returned to Rockland.

At the time this article was released, MaineWatchdog was waiting for Pingree's office to provide receipts for all commercial flights that the Congresswoman booked over the last several months.

*Editor's Note (9/23/2010, 2:11 p.m.) The AOL story did not report that Rep. Pingree's office

was reimbursed for more travel expenses in strictly monetary terms. Several other House members were reimbursed for higher total bills. Rep. Pingree's office was reimbursed for more individual travel expenditures than any other House member.

URLs in this post:

[1] Common Cause: http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4741359

[2] corporation: http://flightaware.com/resources/registration/N888CE

[3] AOL: http://www.aolnews.com/house-money/article/inside-congress-14-million-monthly-travel-bill/19548615

[4] related to travel on private planes: http://watchdog.org/6279/two-maine-congressman-reimbursed-for-over-1m/

[5] Image: http://maine.watchdog.org/files/2010/09/Pingree-at-PWM.jpg

[6] written remarks : http://commdocs.house.gov/committees/judiciary/hju26911.000/hju26911_0f.htm

[7] Abramoff scandal: http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html

[8] completely banned privately funded travel: http://www.commondreams.org/views06/0427-20.htm

[9] "window dressing.": http://articles.sfgate.com/2006-03-30/news/17287318_1_abramoff-scandal-lobbyists-face-test

[10] Flight logs of Sussman's plane: http://viewer.zoho.com/nucs/sdMcaW

[11] Image: http://maine.watchdog.org/files/2010/09/pingree-movement-map.jpg

[12] visited Presumpscot Elementary School : http://www2.portlandschools.org/news/congresswoman-pingree-visits-presumpscot

[13] Portland International Jetport : http://www.mapquest.com/maps?name=Portland+International+Jetport+(PWM)&city=Portland&state=ME&address=1001+Westbrook+St&zipcode=04102&country=US&latitude=43.647588&longitude=-70.31003&geocode=ADDRESS&id=14710388

[14] Westchester County Airport : http://www.mapquest.com/maps?name=Westchester+County+Airport+(HPN)&city=White+Plains&state=NY&address=240+Airport+Rd&zipcode=10604&country=US&latitude=41.073856&longitude=-73.70655&geocode=ADDRESS&id=1318646

[15] house party : http://action.chelliepingree.com/page/event/detail/houseparty/w58

[16] Image: http://maine.watchdog.org/files/2010/09/sussman-movement-map.jpg

[17] Dulles International Airport: http://www.mapquest.com/maps?name=Washington+Dulles+International+Airport+(IAD)&city=Dulles&state=VA&address=1+Saarinen+Cir&zipcode=20166&country=US&latitude=38.953533&longitude=-77.44428&geocode=ADDRESS&id=14719220

[18] cast two votes : http://www.govtrack.us/congress/votes.xpd?year=2010&person=412307

[19] Image: http://maine.watchdog.org/files/2010/09/pingree-sussman-movement-map.jpg

[20] celebrate Kestrel Aviation's move to Maine: http://www.facebook.com/ChelliePingree?v=app_2373072738

[21] Knox County Regional Airport : http://www.mapquest.com/maps?1c=North+Haven&1s=ME&1qn=knox+county+regional&1l=44.128101&1g=-68.874702&1v=CITY&2c=North+Haven&2s=ME&2y=US&2l=44.128101&2g=-68.874702&2v=CITY

[22] North Haven: http://www.mapquest.com/maps?

The Portland Press Herald
Wednesday, October 6, 2010

54°

Pingree's jet travel might be violation

Use of the jet for campaign purposes would violate federal campaign laws.

Most...

Recent Activity

DESCRIPTION OF PRELIMINARY PROCEDURES FOR PROCESSING COMPLAINTS FILED WITH THE FEDERAL ELECTION COMMISSION

999 E Street, NW
Washington, D.C. 20463
FAX (202) 219-3923

Complaints filed with the Federal Election Commission shall be referred to the Enforcement Division of the Office of the General Counsel, where they are assigned a MUR (Matter Under Review) number and forwarded to the Complaints Examination and Legal Review ("CELA") for processing. Within five days of receipt of the complaint, the Commission shall notify all respondents referenced in the complaint, in writing, that the complaint has been filed, and shall include with such notification a copy of the complaint. Simultaneously, the complainant shall be notified that the complaint has been received. The respondents shall then have 15 days to demonstrate, in writing, that no action should be taken against them in response to the complaint. If additional time is needed in which to respond to the complaint, the respondents may request an extension of time. The request must be in writing and demonstrate good cause as to why an extension should be granted. Please be advised that not all requests are granted.

After the response period has elapsed, cases are prioritized and maintained in CELA. Cases warranting the use of Commission resources are assigned as staff become available. Cases not warranting the use of Commission resources are dismissed.

If a case is assigned to a staff person, the Office of the General Counsel shall report to the Commission, making recommendations based upon a preliminary legal and factual analysis of the complaint and any submission made by the respondent. The report may recommend that the Commission: (a) find reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act of 1971, as amended, (hereinafter "the Act"); or (b) find no reason to believe that the complaint sets forth a possible violation of the Act and, accordingly, close the file.

If, by an affirmative vote of four Commissioners, the Commission determines that there is reason to believe that a respondent has committed or is about to commit a violation of the Act, the Office of the General Counsel shall open an investigation into the matter. During the investigation, the Commission has the power to subpoena documents, to subpoena individuals to appear for deposition, and to order written answers to interrogatories. A respondent may be contacted more than once by the Commission during this phase.

If during this period of investigation, a respondent indicates a desire to enter into conciliation, the Office of the General Counsel may recommend that the Commission enter into conciliation prior to a finding of probable cause to believe that a violation has been committed. Conciliation is an attempt to correct or prevent a violation of the Act by informal methods of

conference and persuasion. Most often, the result of conciliation is an agreement signed by the Commission and the respondent. The Conciliation Agreement must be adopted by four votes of the Commission in order to become final. After signature by the Commission and the respondent, the Conciliation Agreement is made public within 30 days of the closing of the entire file.

If the investigation warrants, and no conciliation agreement has been entered into prior to a probable cause to believe finding, the General Counsel must notify the respondent of his/her intent to recommend that the Commission proceed to a vote on probable cause to believe that a violation of the Act has been committed or is about to be committed. The General Counsel shall send the respondent a brief setting forth his/her position on the legal and factual issues of the case. A response brief stating respondent's position on the issues may be submitted within 15 days of receipt of the General Counsel's Brief. Both briefs are then filed with the Commission Secretary and considered by the Commission. Thereafter, if the Commission determines, by an affirmative vote of four Commissioners, that there is probable cause to believe that a violation of the Act has been committed or is about to be committed, the Commission must conciliate with the respondent for a period of at least 30 days, but not more than 90 days. If the Commission is unable to correct or prevent any violation through conciliation, the Office of the General Counsel may recommend that the Commission file a civil suit to enforce the Act against the respondent. Therefore, the Commission may, upon the affirmative vote of four Commissioners, institute civil action for relief in the United States District Court.

See 2 U.S.C. § 437g and 11 C.F.R. Part III.

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